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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

JOINT COMMENTS OF ARBROS COMMUNICATIONS, INC., ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, E.SPIRE COMMUNICATIONS, INC., FAIRPOINTE COMMUNICATIONS SOLUTIONS, INTERMEDIA COMMUNICATIONS INC., JATO COMMUNICATIONS CORP., KMC TELECOM, INC., METROMEDIA FIBER NETWORK, NEWSOUTH COMMUNICATIONS, INC., AND PATHNET COMMUNICATIONS REGARDING SECOND FURTHER NOTICE OF PROPOSED RULEMAKING IN CC DOCKET NO. 98-147 AND FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING IN CC DOCKET NO. 96-98

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SUMMARY

At the heart of the market-opening provisions of the Telecommunications Act of 1996 ("1996 Act") of the Communications Act of 1934, as amended (the "Act") is Section 251(c). Section 251(c) imposes duties on incumbent local exchange carriers ("ILECs") that enable competitors to provide both facilities-based and resale competition. Two critical obligations in section 251(c) are the ILECs' duties to provide (1) interconnection (Section 251(c)(2)), and (2) access to unbundled network elements ("UNEs"). Without both, competition is simply not feasible.

Two of the methods by which competitors may obtain interconnection with ILECs and access to UNEs – and, therefore, two major components of achieving the statutory objectives of Sections 251(c)(2) and 251(c)(3) – are physical and virtual collocation. In the mid-1990's, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") found that the Act, as it then existed, did not give the Commission the requisite authority to order physical collocation of competitor's equipment in ILEC premises. In the 1996 Act, Congress included Section 251(c)(6) to provide the Commission with the statutory authority it needed to require collocation so that Sections 251(c)(2) and 251(c)(3) could be fully implemented.

The Commission interpretation of Section 251(c)(6), to require the collocation of equipment that is "used or useful" for interconnection or access to UNEs, has been remanded to the Commission by the DC Circuit for further consideration and a better explanation. Four years of experience with physical collocation by CLECs underscore that it is a vital means of interconnection and access to UNEs if competition is to take hold. The rules of statutory construction require that the Commission give meaning to this provision of the statute consistent with the context and overall purpose of the Act. Because the strict application of the term

"necessary" to refer to only that equipment indispensable for interconnection or access to UNEs renders section 251(c)(6) all but meaningless and will not further these statutory purposes, it would be unreasonable to interpret the term narrowly in the circumstances. Instead, Section 251(c)(6) should be read to authorize physical collocation that the Commission deems required to fulfill the goals of section 251(c), including the collocation of any equipment without which the Commission concludes that the ILECs cannot satisfy their obligations under sections 251(c)(2) and (c)(3) and the pro-competitive objectives of the Act cannot be achieved.

In considering rules governing space selection, again the Commission should reaffirm its previous decisions. The requirements of Sections 251(c)(2), (c)(3), and (c)(6) combined with the opinion of the D.C. Circuit upholding the propriety of cageless collocation, require that competitors play the principal role in choosing collocation space from unused space in ILEC premises. Likewise, permitting ILECs to require separate or isolated facilities and separate entrances for collocation would not conform with the requirements and purposes of Sections 251(c)(2), (c)(3), and (c)(6) because they would discriminate against CLECs, would be unjust and unreasonable, and would thwart competition.

Cross-connections between collocators are also necessary to ensure ILECs meet their interconnection and unbundling obligations. When one collocated carrier connects to a second collocated carrier that is interconnected with the ILEC or buying UNEs, a cross-connect between the two is integrally related to such interconnection or access. When a carrier providing competitive interoffice transport collocates and connects to a second carrier that is purchasing UNEs from the ILEC, for example, the transport carrier facilitates and supports the second carrier obtaining access to interconnection and UNEs. But for the collocation of the transport carrier, the second carrier often would not find it justifiable to collocate its own equipment to

interconnect or access the ILEC's UNEs, frustrating Sections 251(c)(2) and 251(c)(3) of the Act. The Commission should also declare cross-connects to be a UNE, and require ILECs to permit the "stable manhole zero" collocation option discussed in the *Second Further Notice*.

Denial of collocation and cross-connects for competitive transport providers would have a chilling effect on carriers' abilities to provide advanced services and would conflict with the pro-competitive goals of Section 251(c)(2) and (c)(3) in another way. Providers of interoffice transport and dark fiber not only need collocation in order to connect their networks directly to the ILEC where they themselves are purchasing UNEs from the ILEC, but to connect indirectly to the ILEC when they are providing services as carriers' carriers to other CLECs. The Act's purpose is to promote competition, including advanced services competition, not to place limits on such competition. Competition for interoffice transport simply cannot adequately develop without a Commission mandate that ILECs must permit collocation by interoffice transport providers.

The Joint Commentors also urge the Commission to adopt national standards for the provisioning of collocation arrangements other than caged collocation. Specifically, the Commission should specify 60 days as the maximum provisioning interval for cageless, virtual, and collocation within remote structures. Modifications to existing collocation arrangements, such as expansion of cages, additions to cageless arrangements, and additional power outlets, should be provisioned within 30 days. Rules establishing such intervals are necessary because the ILECs have the incentive and ability to delay all forms of collocation for CLECs. In some markets, ILECs have delayed cageless collocation. The adoption of provisioning intervals for non-caged collocation arrangements will promote the ability of CLECs to compete effectively in

advanced services and other telecommunications services markets furthering the objectives of Sections 251(c)(2), (c)(3), and (c)(6).

The Joint Commentors also recommend national standards for space reservation to eliminate ILEC ability to reserve space in central offices for their own use or that of their affiliates without regard for the needs of competing carriers, and thereby create artificial space exhaustion. In establishing national standards, the Joint Commentors recommend that the Commission follow the lead of those states such as Florida, California, Texas, and Washington that have already established space reservation standards and permit properly supported reservations of space for transmission equipment only for up to 12 months and for other equipment only for up to 18 months.

In the *Fifth Further Notice of Proposed Rulemaking* ("*Fifth FNPRM*"), the Commission seeks comment on a number of issues concerning the deployment of new network architectures. As the Commission recognized in the *UNE Remand Order*, access to the unbundled subloops in one of the lynchpins of facilities-based competition. In order to promote competitive alternatives, particularly to advanced services, the Joint Commenters submit that the Commission must amend its collocation and unbundling rules, particularly in light of the recent technological developments and product innovations since the release of the *UNE Remand Order*. Specifically, in response to the *Fifth FNPRM*, the Joint Commenters urge the Commission to amend its rules as follows:

<u>Unbundling Obligations</u>

- The Commission should amend its rules to require unbundled access to the loops consisting of optical wavelengths generated by DWDM equipment, in addition to DS1, DS3, fiber, other high capacity loops. Further, the Commission should clarify that as part of their unbundling obligations, the ILEC must provide access to all technically feasible

transmission speeds and quality of service classes, including Constant Bit Rate and Variable Bit Rate, even if the ILEC does not currently utilize these themselves.

- The Commission should amend its rules governing unbundled access to loops and subloops to require ILECs to notify CLECs of any planned deployment of fiber facilities at least 12 months prior to such a rollout, and further, should require ILECs to maintain existing copper infrastructure for a 10-year transition period.

- The Commission should establish a new Broadband UNE, essentially an "intraloop enhanced extended loop," consisting of the copper subloop and the fiber feeder subloop, with multiplexing, in light of space constraints associated with remote premises collocation.

Collocation Obligations

- The Commission should amend its collocation rules to eliminate any distinction between obligations governing central office collocation and remote premises collocation by clarifying that physical collocation is available at *all* remote locations, pursuant to the same cost allocation and space allocation rules as are applicable to physical collocation in the central office.

- The Commission should require that ILECs reserve, at a minimum, 50% of all available collocation space in remote premises for use by CLECs.

- The Commission should clarify that virtual collocation is available at the option of CLECs, including the virtual collocation of line cards in remote terminals, and should further clarify that title of any virtually collocated equipment need not be transferred to the ILEC. In addition, rates for ILEC-provided installation, maintenance and repair must be cost-based.

- The Commission should clarify that competitors have the right to cross-connect to ILEC equipment at all remote premises, including within the remote terminal, under the same terms and conditions (including cross-connections at cost-based rates) as at the central office. To the extent that cross-connections cannot be made internally, CLECs must be allowed to cross-connect from adjacent collocation arrangements.

The Commission should clarify that ILECs must provide nondiscriminatory access to OSS interfaces necessary to allow CLECs to order subloops and associated features and functions. Further, the rules should provide CLECs with nondiscriminatory access to remote loop testing ability.

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I. INTRODUCTION

By their attorneys and pursuant to the *Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147, and the *Fifth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98[1] Arbros Communications, Inc., the Association for Local Telecommunications Services ("ALTS"), the Competitive Telecommunications Association ("CompTel"), e.spire Communications, Inc., FairPoint Communications Solutions, Inc., Intermedia Communications Inc., Jato Communications Corp., Metromedia Fiber Network, Inc., KMC Telecom, Inc., NewSouth Communications, Inc., and Pathnet Communications (hereinafter the "Joint Commenters") hereby respectfully submit these comments. The Joint Commenters represent the interests of a wide range of CLEC deployment strategies, and include "fiber based" CLECs, data CLECs, wholesale CLECs, a competitive provider of interoffice

[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket 98-147, Order on Reconsideration ("*Order*") and Second Further Notice of Proposed Rulemaking ("*Second Further Notice*"), *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Fifth Further Notice of Proposed Rulemaking ("*Fifth FNPRM*") (rel. Aug. 10, 2000).

transport, as well as the two leading trade associations representing the CLEC industry. ALTS is a leading national trade association representing over 200 facilities-based competitive local exchange carriers ("CLECs"). CompTel is a leading industry association over 350 competitive telecommunications companies and their suppliers providing local, long distance, international, and enhanced services nationwide.

The ground-breaking rules adopted by the Commission in its *Advanced Services First Report and Order*[2] have, since their adoption in March 1999, spurred the development of competition in the advanced services market. Indeed, the Commission's most recent report regarding the deployment of advanced services indicated that at the end of 1999 the deployment of advanced services to residential end-users had increased by three-fold over the year before.[3] There than be little doubt that the massive rollout of advanced services to American consumers cited by the Commission in the *Advanced Telecommunications Capability Second Report* is due in large part to the rules promulgated by the Commission in the *Advanced Services First Report and Order*. There, the Commission took dramatic and essential steps to address anti-competitive incumbent local exchange carrier ("ILEC") behavior, which included delaying collocation, larding the collocation process with unnecessary costs, and imposing unreasonable space

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2 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761 (1999) ("*Advanced Services First Report and Order*"), *aff'd in part and remanded in part sub nom. GTE Service Corp. v. FCC*, 205 F. 3d 416 (D.C. Cir. 2000) (*GTE v. FCC*).

3 *See In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket 98-146, Second Report, ¶ 8 (rel. Aug. 21, 2000) ("*Advanced Telecommunications Capability Second Report*").

restrictions upon competitors.[4] The rules promulgated by the Commission in the *Advanced Services First Report and Order*, consistent with Section 251(c)(6)[5] of the Communications Act of 1934, as amended (the "Act") by the Telecommunications Act of 1996 (the "1996 Act"),[6] imposed, among other things, a statutory duty on ILECs to allow the physical collocation of multifunctional equipment, and allowed CLECs to interconnect their equipment with other collocated carriers through cross-connections. These rules were necessary to achieve the pro-competitive goals of the Act, in fact, were cited by the Commission in the *Advanced Telecommunications Capability Second Report* as one of the "*significant actions*" taken by the Commission to open "bottlenecks in the market" and "encourage the deployment of [advanced] service[s] to underserved areas."[7]

The significance, indeed, the fundamental necessity, of the collocation rules promulgated by the Commission in the *Advanced Services First Report and Order* cannot be overstated. Accordingly, for consumers to continue to realize the maximum potential benefit associated with advanced services deployment, the Commission should revisit and modify the collocation rules established in the *Advanced Services First Report and Order* as proposed herein. The Commission should also adopt new collocation and unbundling rules or clarify existing rules in order to remove as-yet-unaddressed barriers to entry and further level the competitive playing field. Modification of the rules, as detailed in these Comments, would serve to reduce drastically the type of unnecessary litigation that has hampered the development of local competition over

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4 *Second Further Notice*, ¶ 2.

5 47 U.S.C. § 251(c)(6).

6 Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("1996 Act").

7 *Advanced Telecommunications Capability Second Report,* ¶ 251 (emphasis added).

the last four years and allow the deployment of advanced services to continue unimpeded. At bottom, the Commission should approach this remand proceeding as a means of building upon the solid foundation it already has established.

II. BACKGROUND

A. THE COMMISSION'S COLLOCATION RULES

In 1993 the Commission first required certain LECs to provide physical collocation in its *Expanded Interconnection* proceeding.[8] On review, the D.C. Circuit in 1994 found that the Commission lacked the necessary statutory authority under Section 201(a)[9] of the Act to order physical collocation.[10] As the court in *GTE v. FCC* summarized, "absent a more definite congressional authorization, the court was unwilling to defer to the Commission's unduly broad reading of § 201(a)."[11] The court remanded the Commission's *Expanded Interconnection* decision to the Commission.[12]

On remand, the Commission adopted rules designed "to ensure local telephone companies offer expanded interconnection for both special access and switched transport

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8 *Expanded Interconnection with Local Telephone Company Facilities, First Report and Order*, 7 FCC Rcd 7369 (1992)(*Special Access Order*), *vacated in part and remanded, Bell Atlantic*, 24 F. 3d 1441 (1994); *First Reconsideration*, 8 FCC Rcd 127 (1993); *vacated in part and remanded, Bell Atlantic*, 24 F. 3d 1441; *Second Reconsideration*, 8 FCC Rcd 7341 (1993); *Second Report and Order*, 8 FCC Rcd 7374 (1993) (*Switched Transport Order*), *vacated in part and remanded, Bell Atlantic Telephone Cos., v. FCC*, 24 F. 3d 1441; *Remand Order*, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*), *remanded for consideration of 1996 Act, Pacific Bell, et al. v. FCC*, 81 F. 3d 1147 (1996) (collectively referred to as *Expanded Interconnection*).

9 *See* 47 U.S.C. § 201(a).

10 *Bell Atlantic Telephone Companies v. F.C.C.*, 24 F. 3d 1441, 1445-46 (D.C. Cir. 1994) (*BA v. FCC*).

11 *GTE Service Corp. v. FCC*, 205 F. 3d 416, 419 (D.C. Cir. 2000)(*GTE v. FCC*).

12 *BA v. FCC*, 24 F. 3d at 1445-46.

through . . . virtual collocation."[13] The *Remand Order* also was challenged. But, while the challenge was pending, the 1996 Act was enacted. The 1996 Act included a provision, Section 251(c)(6), that in combination with the Commission's general rulemaking authority, provided the Commission with the specific statutory authority to require physical collocation that was lacking in Section 201(a). Rather than rule on the Commission's old rules, the D.C. Circuit sent the *Remand Order* to the Commission so it could consider the impact of the recently-enacted 1996 Act.[14]

As part of its watershed *Local Competition First Report and Order*, the Commission established the groundwork for competition by establishing rules for obtaining interconnection to ILEC networks and access to UNEs, thereby promoting the objectives of the ILEC obligations under Sections 251(c)(2) (interconnection) and 251(c)(3) (access to unbundled network elements).[15] In the *Local Competition First Report and Order*, the Commission recognized that the 1996 Act allowed several forms of interconnection and access, of which physical collocation was only one.[16] The Commission found that in order for the procompetitive purposes of the Act to be fulfilled, carriers must be able to, at their option, take advantage of *each* of them:

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13 *Remand Order*, 9 FCC Rcd at 5156, ¶ 3.

14 *Pacific Bell v. FCC*, 81 F. 3d 1147; *Implementation of the Local Telecommunications Provisions in the 1996 Act,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15784 ¶ 1359 (1996) (*"Local Competition First Report and Order"*).

15 *Local Competition First Report and Order*, 11 FCC Rcd at 15776-811, ¶¶ 542-617.

16 *Local Competition First Report and Order*, 11 FCC Rcd at 15779-81, ¶ 549-53. The Commission rejected the ILEC suggested notion that section 251(c)(6) should limit interconnection to points where only collocation is possible. *Id.* at 15779, ¶ 550.

> under Sections 251(c)(2) and 251(c)(3), any requesting carrier may choose *any* method of technically feasible interconnection or access to unbundled elements at a particular point.[17]

The Commission also found that the new legislation shored up the deficiencies that the D.C. Circuit previously had found existed in the Act with respect to its authority to order collocation: "Section 251(c)(6) provides the Commission with explicit authority to mandate physical collocation as a method of providing interconnection or access to unbundled elements."[18] The Commission concluded that "in enacting Section 251(c)(6), Congress intended to expand the interconnection choices available to requesting carriers, not to restrict them."[19] Moreover, the Commission found that the 1996 Act "specifically directed incumbent LECs to provide physical collocation for interconnection and access to unbundled network elements, absent technical or space constraints pursuant to Section 251(c)(6) of the Communications Act."[20]

In the *Local Competition First Report and Order* the Commission addressed for the first time the issue of what equipment competitors must be allowed to collocate in an ILEC office pursuant to the 1996 Act. The Commission concluded that Section 251(c)(6) obligated ILECs to allow physical collocation of:

> equipment used for the purpose of interconnection or access to unbundled network elements. . . . A strict reading of the term "necessary" in these circumstances could allow LECs to avoid

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17 *Id.* at 15779, ¶ 549.

18 *Id.* at 15779, ¶ 551. The D.C. Circuit affirmed this conclusion by finding that "[t]he 1996 Act completely revamped the statutory landscape by providing explicit congressional authorization for physical collocation." *GTE v. FCC* 205 F. 3d at 419.

19 *Local Competition First Report and Order*, 11 FCC Rcd at 15779, ¶¶ 550-51.

20 *Id.*, at 15785-86, ¶ 561 (citing 47 U.S.C. 251(c)(6)).

> collocating the equipment of the interconnectors' choosing, thus undermining the pro-competitive purposes of the 1996 Act.[21]

It is interesting to note that none of the ILECs challenged the Commission's decisions regarding collocation when they appealed the *Local Competition First Report and Order.*

Unfortunately, the ILECs continued to forestall the development of meaningful competition by making it difficult for competitors to obtain physical collocation. Nevertheless, through dogged effort and the realization of end users that competitors could provide valuable services, competition has made initial inroads in a number of markets. As a result, competitors have begun to offer new and innovative services previously not offered by the ILECs. To counter this development, the ILECs instituted additional roadblocks to prevent the proliferation of new, innovative telecommunications including those known as advanced services.

In its March 31, 1999, *Advanced Services First Report and Order* the Commission realized that it was "critical that the marketplace for [advanced] services be conducive to investment, innovation, and meeting the needs of consumers."[22] The Commission committed itself to "removing barriers to competition" so that competitors could effectively compete with the ILECs.[23] To that end, the Commission adopted several measures designed to enforce its earlier rules and promote competition in the advanced services market.[24] The goal was to "create incentives for providers of advanced services to innovate and to develop and

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21 *Local Competition First Report and Order,* at 15794 ¶ 579 (citing *National Railroad Passenger Corporation v. Boston and Maine Corp.*, 503 U.S. 407, 417 (1992)).

22 *Advanced Services First Report and Order*, ¶ 2.

23 *Id.* at 4763, ¶ 3.

24 *Id.* at 4763, ¶ 4. It is important to note that the Commission concluded "that the pro-competitive provisions of the 1996 Act are technology-neutral and thus apply equally to advanced services and to circuit-switched voice services." *Id.* at 4769 ¶ 15. Therefore although the *Advanced Services First Report and Order* might appear to only deal with (continued...)

deploy new technologies and services on a more expeditious basis,"[25] by reducing the costs and delays associated with collocating in an ILEC's central office thereby promoting lower prices and increased choices for consumers of advanced services.[26]

In order to accomplish these goals, the Commission took several steps. The Commission removed the ability of ILECs to create artificial space limitations by expanding the types of physical collocation competitors could obtain from ILECs, requiring ILECs to offer shared caged and cageless collocation.[27] The Commission expanded the space for collocation by requiring ILECs to offer collocation in any unused space as well as in adjacent controlled environmental vaults or similar structures.[28] The Commission closed some of the loopholes ILECs were using to thwart collocation, *e.g.*, security issues, safety requirements.[29] The Commission also clarified that its rules require ILECs "to permit collocation of all equipment that is necessary for interconnection or access to unbundled network elements, regardless of whether such equipment includes a switching functionality, provides enhanced services capabilities, or offers other functionalities."[30]

(...continued)
advanced services, the requirements of the Commission's order apply to the facilities used and not the services being offered.

25 *Id.*

26 *Id.* at 4764, ¶ 6, 4770 ¶ 18. The Commission steps, among other things, included requiring ILECs to: make shared and cageless collocation available; permit collocation in CEVs or similar structures when collocation is exhausted at a particular LEC location; adopt reasonable security measures; apply nondiscriminatory safety requirements on CLEC equipment; allow collocation of CLEC necessary for interconnection and access to UNEs; permit CLEC tours of the entire ILEC office when the CLEC has been denied collocation space; and, remove old, obsolete equipment from their offices.

27 *Id.* at 4784, ¶ 41 (shared collocation cages), 4784-4785 ¶ 42 (cageless collocation).

28 *Id.* at 4788-4789, ¶ 49.

29 *Id.* at 4786-4789, ¶ 45-49 (security), 4780-4782 ¶ 34-36 (safety requirements).

30 *Id.* at 4776-4777 ¶ 28.

In strengthening the collocation requirements first established in the *Local Competition First Report and Order*, the Commission furthered the statutory objectives of Sections 251(c)(2) and 251(c)(3) of the Act. The Commission recognized that:

> At the core of the Act's market-opening provisions is Section 251. In Section 251, Congress sought to open local telecommunications markets to competition by, among other things, reducing economic and operational advantages possessed by incumbents. [31]

Section 251 sets out the three methods Congress envisioned to initiate and promote competition: interconnection, access to UNEs, and resale. Not failing to take an opportunity to delay competition, several ILECs challenged aspects of the Commission's decision strengthening the collocation rules.

1. THE D.C. CIRCUIT'S DECISION

The D.C. Circuit issued its opinion reversing the *Advanced Services First Report and Order* in *GTE v. FCC* on March 19, 2000.[32] The court affirmed the Commission's decisions requiring ILECs to provide shared and cageless collocation, and make available adjacent property for collocation.[33] The court found that cageless collocation was "reasonable and consistent *with the statutory purpose of promoting competition*, without raising the threat of unnecessary takings of LEC property."[34] The Court concluded that it was "hardly surprising that the Commission opted to prohibit LECs from forcing competitors to build cages, particularly

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31 *Id.* at 4768 ¶ 13 (citing Joint State of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d (1996)).

32 *GTE v. FCC*, 205 F. 3d 416.

33 *Id.* at 424-25.

34 *Id.* (emphasis added). Specifically, the court found the Commission's decision to require cageless collocation reasonably interpreted section 251(c)(6) because it saved space, reduced costs, recognized that security concerns could be resolved without the necessity of cages, and, in general, promoted competition. *Id.*

given the alternative means available to LECs to ensure the security of their premises."[35] The court also affirmed the Commission's general conclusions regarding the allocation of security costs.[36]

The court, however, vacated and remanded several of the Commission's decisions. The court vacated the Commission's requirement that ILECs allow collocation of equipment "used or useful" for interconnection or access to UNEs, and remanded this determination back to the Commission for further consideration and a better explanation of the Commission's interpretation.[37]

The court also found that the Commission "went too far in giving competitors rights beyond what is reasonably required by § 251(c)(6)" when it decided "that LECs '*must* give competitors the option of collocating equipment *in any unused space* within the incumbent's premises, to the extent technically feasible, and *may not* require competitors to collocate in a room or isolated space separate from the incumbent's own equipment.'"[38] The court found that the Commission failed to give good reasons: (1) why a competitor and not the LEC should choose where to establish physical collocation; (2) why LECs are forbidden from requiring competitors to use separate entrances to access their facilities; and (3) why LECs are forbidden from requiring competitors to use separated or isolated rooms or floors.[39] The court said that

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35 *Id.*

36 *Id.* at 427.

37 *Id.* at 422-24.

38 *Id.* at 425-26 (quoting the *Advanced Services First Report and Order*, ¶ 42 (emphasis added by court)).

39 *GTE v. FCC*, 205 F. 3d at 426.

"[o]n remand, the Commission will have an opportunity to refine its regulatory requirements to tie the rules to the statutory standard."[40]

As explained below, the statute combined with the court's decision almost requires the Commission to reach the same conclusions it reached in the *Local Competition First Report and Order* and *Advanced Services First Report and Order*, albeit with better reasoning to satisfy the deference requirement of a *Chevron* step-two analysis.

III. THE MEANING OF "NECESSARY": THE COMMUNICATIONS ACT OBLIGATES ILECS TO PROVIDE COLLOCATION AS "NECESSARY" TO ACHIEVE THE PURPOSES OF SECTION 251(C)(2) AND ACCESS TO UNES UNDER SECTION 251(C)(3)

A. THE D.C. CIRCUIT DECISION ALLOWS FOR A BBROADER INTERPRETATION OF "NECESSARY" IF ADEQUATELY EXPLAINED AND PROPERLY RELATED TO THE STATUTORY PURPOSES

Perhaps the most important issue facing the Commission on remand in this proceeding is the proper interpretation of the term "necessary" found in Section 251(c)(6) of the Act. Equally important is the Commission's explanation justifying that interpretation. The D.C. Circuit concluded that "in some significant respects," the Commission's earlier interpretation of the term "necessary" found no support in the Act, but the Court declined to substitute its own interpretation in deference to the Commission's role as principal interpreter of the Act.[41] Significantly, while the D.C. Circuit upheld the Commission's *Advanced Services First Report and Order* only to the extent that it "merely requires LECs to provide collocation of competitors equipment that is directly related to and thus necessary, required, or indispensable to 'interconnection or access to unbundled network elements,'" the Court also indicated that, with

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40 *Id.*

41 *Id.* at 424.

proper explanation in light of the statute's purposes, a rule that mandated physical collocation more broadly could be justified.[42]

It is crucial to recognize at the outset that terms such as "necessary" and "required" are not limited to a single interpretation as the ILECs are sure to argue. Indeed, in reversing another decision of the D.C. Circuit, the U.S. Supreme Court has observed that the triad of narrow interpretation offered by the D.C. Circuit – "necessary," "required," and "indispensable" – must yield to an agency's alternative definition of "useful or appropriate." [43] In fact, the Supreme Court in *National R.R. Passenger Corp.* interpreted a provision of the Rail Passenger Service Act of 1970 remarkably similar to Section 251(c)(6) in that it provided for the Interstate Commerce Commission to order conveyance of privately owned railroad property to Amtrak in the event negotiations between Amtrak and the owner for the sale of such property failed. The statue in question permitted the conveyance in these circumstances provided that the property was "required for intercity rail passenger service."[44] A strict interpretation of "required," the Supreme Court concluded, would "leave[] little substance to the statutory presumption in favor of Amtrak's need [for property to provide modern, efficient, and economical rail passenger service] and so is in clear tension with that part of the statute."[45]

The Court's directions to the Commission upon remand tacitly acknowledge the difficulty surrounding the interpretation of the ambiguous term "necessary." Although the Court reminded the Commission that on remand it must "operate within the limits of 'the ordinary and

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42 *Id.*

43 *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S.Ct. 1394, 1402 (1992). *See also McCulloch v. Maryland*, 4 L.Ed. 579 (1819) (C.J. Marshall) ("necessary" means "convenient and useful" not merely "most direct and simple").

44 *National R.R. Passenger Corp.*, 112 S. Ct. at 1398; 45 U.S.C. § 562(d).

fair meaning of [the statute's] terms,'"[46] it also recognized that "the disputed terms in § 251(c)(6) are ambiguous in their meanings."[47] Importantly, the Court did not condemn the Commission's interpretation of the term "necessary" outright, but stated that "the FCC *appears* to ignore the statutory reference to 'necessary'"[48] and that "the Collocation Order as presently written *seems* overly broad and disconnected from the statutory purpose enunciated in § 251(c)(6)."[49] On remand, the Court instructed the Commission that the statutory reference to "necessary" must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit "necessary" to that which is required to achieve a desired goal. The [Supreme] Court's admonition seems particularly relevant here where a broader construction of "necessary" under § 251(c)(6) might result in an *unnecessary* taking of private property.[50]

Accordingly, rather than narrowly focus on the semantics of the term "necessary" – which to some extent the D.C. Circuit did - the Commission should first direct its attention to the context of Section 251(c)(6) and the statutory purposes that provision is designed to serve so as to ensure that its interpretation of Section 251(c)(6) is consistent with a reasonable reading of the words of the statute and furthers those purposes.[51]

(...continued)

45 *National R.R. Passenger Corp.*, 112 S. Ct. at 1402.

46 *GTE v. FCC*, 205 F. 3d at 424 (citing *Iowa Utilities Bd.*, 525 U.S. 366, 390 (1999) (remanding the FCC's rule establishing a minimum list of UNEs for failure to give any effort to the "necessary" and "impair" provision of Section 251(d)(2)).

47 *Id.* at 421.

48 *Id.* (emphasis added)

49 *Id.* (emphasis added)

50 *Id.* at 423 (emphasis in original).

51 *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (the "meaning of statutory language, plain or not, depends on context"); *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 610 (1944) (although a literal reading of a statute can produce a result, it would be arbitrary to examine a phrase ignoring the purpose of the statute).

B. THE PROPER INTERPRETATION OF SECTION 251(C)(6) IS THAT ILECS MUST PROVIDE PHYSICAL COLLOCATION OF EQUIPMENT AS NEEDED TO FURTHER THE PRO-COMPETITIVE PURPOSES OF THE ACT

1. SECTION 251(C)(6) MUST BE INTERPRETED IN LIGHT OF THE STATUTORY PURPOSES OF SECTIONS 251(C)(2) AND 251(C)(3)

The Joint Commenters submit that, interpretation of Section 251(c)(6) in light of the structure of the 1996 Act as a whole, and the context and purposes of Section 251(c) in particular, makes clear that the Commission may and should interpret the ILECs' obligation to provide for collocation under Section 251(c)(6) more broadly than the strict sense of "required or indispensable" would permit. As the D.C. Circuit recognized in *GTE v. FCC*, a central purpose of the 1996 Act is the promotion of competition.[52] If the ILECs under Section 251(c)(6) are obligated only to permit collocation of equipment of a type that meets a minimum physical threshold of interconnection or access to UNEs, that purpose will be frustrated.

More specifically, a strict interpretation of Section 251(c)(6) would create a strong tension with the particular statutory objectives of Sections 251(c)(2)[53] and 251(c)(3).[54] As detailed below, when adopting rules to implement Section 251(c)(6), the Commission is

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52 205 F. 3d at 425.

53 Section 251(c)(2) promotes facilities-based competition by requiring ILECs to provide interconnection with their by other carriers networks for purposes of transmitting or routing telephone exchange service or exchange access. Section 251(c)(2) requires ILECs to provide interconnection "at any technically feasible point within the carrier's network" (251(c)(2)) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(2)(D). The statute specifically provides that such interconnection must be at least equal in quality to that provided by the LEC *to itself* or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection, *i.e.,* the ILEC must provide nondiscriminatory access to interconnection. 47 U.C.C. § 251(c)(2)(C) (emphasis added).

54 Section 251(c)(3) obligates ILECs to provide requesting carriers access to unbundled network elements in the ILECs network in order to allow requesting carriers to provide telecommunications services of their own choosing. Specifically, Section 251(c)(3) requires such access to be nondiscriminatory, available at any technically feasible point, (continued...)

empowered to require – and ILECs must be obligated to allow – collocation to the extent needed to advance the objectives of these two sections. In this sense, the use of the term "necessary" in Section 251(c)(6) to relate to the stated objectives of Sections 251(c)(2) and 251(c)(3), albeit limited to the context of collocation, is more akin to the use of the term "necessary" in Section 4(i) and 201(b) of the Act, whereby the Commission may take whatever actions are necessary to fulfill the purposes, objectives, and goals of the Act.[55] In the following sense, then, the D.C. Circuit erred in its focus: the inquiry is not whether collocation of a particular type of equipment is necessary to interconnect or access a UNE in some minimalist engineering sense. Rather the challenge is to ascertain what equipment in what types of arrangements must requesting carriers, taken as a whole, have the ability to collocate if the statutory purposes of Sections 251(c)(2) and 251(c)(3) are to be fulfilled.

The close link between Section 251(c)(6) and Sections 251(c)(2) and 251(c)(3) the Joint Commenters urge herein is not novel. Indeed, when the Commission first examined Section 251(c)(6) in its *Local Competition First Report and Order*, it recognized that collocation was merely one of several means by which interconnection and access to UNEs could be achieved.[56] As the Commission recognized in its *Local Competition First Report and Order,* there are several ways to interconnect two networks, such as meet points or interconnection

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(...continued)
and provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251(c)(3).

55 *See* 47 U.S.C. §§ 154(i), 201(b).

56 11 FCC Rcd at 15779 ¶ 550 ("We are not persuaded that Congress intended to limit interconnection points to location only where collocation is possible.")